No. 22-_____

In the Supreme Court of the United States

PERCY UTLEY,

Petitioner,

versus

CITY OF HOUSTON, TEXAS; ART ACEVEDO; JOHN DOE OFFICERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit has so far departed from the accepted and usual application of the pleading standard as to require this Court's correction.

2. Whether the Fifth Circuit has created a new and unique requirement for civil rights plaintiffs to affirmatively prove a negative when the police merely claim the existence of probable cause, without more.

PARTIES TO THE PROCEEDINGS

Petitioner Percy Utley was the plaintiff in the district court proceedings, and the appellant in the appellate court proceedings. Respondents City of Houston, Art Acevedo, and John Doe Officers were the defendants in the district court proceedings and appellees in the appellate court proceedings.

RELATED CASES

Utley v. City of Houston, No. 4:20-cv-1907, United States District Court for the Southern District of Texas. Judgment entered November 24th, 2021.

Utley v. City of Houston, No. 21-20623, United States Court of Appeals for the Fifth Circuit. Judgment entered June 17th, 2022.

Utley v. City of Houston, No. 21-20623, United States Court of Appeals for the Fifth Circuit. Rehearing denied July 18th, 2022.

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The Fifth Circuit's opinion is reported at *Utley v. City of Houston*, 2022 U.S. App. LEXIS 16907, 2022 WL 2188529 (5th Cir. June 17, 2022), and reproduced at 1a–4a. The Fifth Circuit's denial of petitioner's petition for rehearing *en banc* is reproduced at 6a. The opinions of the District Court for the Southern District of Texas are reproduced at 7a–11a.

JURISDICTION

The Court of Appeals entered judgment on June 17th, 2022. 5a. It then denied a timely petition for rehearing *en banc* on July 18th, 2022. 6a. This petition is timely filed on or before October 17th, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Texas Penal Code § 42.03

> (a) A person commits an offense if, without legal privilege or authority, he intentionally, knowingly, or recklessly:
>
> > (1) obstructs a highway, street, sidewalk, railway, waterway, elevator, aisle,

hallway, entrance, or exit to which the public or a substantial group of the public has access, or any other place used for the passage of persons, vehicles, or conveyances, regardless of the means of creating the obstruction and whether the obstruction arises from his acts alone or from his acts and the acts of others; or

(2) disobeys a reasonable request or order to move issued by a person the actor knows to be or is informed is a peace officer, a fireman, or a person with authority to control the use of the premises:

(A) to prevent obstruction of a highway or any of those areas mentioned in Subdivision (1); or

(B) to maintain public safety by dispersing those gathered in dangerous proximity to a fire, riot, or other hazard.

(b) For purposes of this section, "obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous.

STATEMENT OF THE CASE

Percy Utley was simply exercising his right to peaceably assemble and protest. While exercising that right, officers from the Houston Police Department ("HPD") kettled and arrested him and the other protestors he was with on the pretext that they were obstructing a roadway. The district court dismissed, and the Fifth Circuit affirmed, Mr. Utley's cause of action against the City of Houston ("City"), then-chief of police Art Acevedo, and the John Doe officers that affected his arrest on the basis that probable cause supported the arrest, even though the complaint directly pled a lack of probable cause in two clear ways, and no facts in the complaint could have supported the finding of probable cause. 1a–4a, 7a–9a. This ruling directly opposes this Court's clear law with respect to pleading requirements, and creates a Circuit split with respect to the detail and specificity with which civil rights plaintiffs must plead First and Fourth Amendment claims.

Houston is not a city that is known for rioting, violence, or property damage during protests. People organize and attend protests for a variety of reasons, ranging from political (e.g. protesting an unpopular decision by an elected official) to religious (e.g. protesting an abortion clinic) and anything in between. It is a longstanding and fundamental right of American citizens. Mr. Utley was participating in one such protest. The protest was peaceful and, until HPD intervened, otherwise uneventful. The protestors were not

obstructing any vehicle roadway, sidewalk, or traffic of any mode. Despite this peaceful and protected status, HPD kettled and arrested all the protestors *en masse* anyway. It dealt with other protests in the same manner within a few days of the protest attended by Mr. Utley. All told, several hundred peaceful protestors were arrested over the course of a few weeks on the basis of "obstructing a roadway," and then released uncharged.

Mr. Utley brought suit for violations of his civil rights. He alleged that this systematic "catch-and release" of himself and the other protestors made violations of his First and Fourth Amendment rights. He alleged that Mr. Acevedo, as chief of police, developed and implemented this policy for protest response, and attempted to amend his complaint to allege Mr. Acevedo's presence at one such mass arrest. He further alleged that because Mr. Acevedo was its policymaker, that the City of Houston could also be liable because this policy caused his constitutional injury.

The district court dismissed the action with little explanation, claimed it was giving Mr. Utley the opportunity to amend his complaint, but then denied leave to amend and dismissed the case with prejudice. Mr. Utley timely appealed, and the original Panel of the Fifth Circuit affirmed the dismissal. It claimed that the facts pled proved Mr. Utley violated the Obstruction of a Roadway statute provided *supra*, without explaining its reasoning as to how the alleged facts supported

that conclusion. The same Panel then denied Mr. Utley's timely motion for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision is problematic and requires this Court's intervention in two ways. First, it not only completely ignored this Court's clear rules with respect to pleading requirements, plausibility, and the use of inference in deciding motions to dismiss, it flipped those rules completely on their head. Not only does it flout the accepted understanding of pleading requirements generally, it also stands in clear contrast to the application of this standard to First and Fourth Amendment cases. Second, it effectively creates a new rule, unique among the Circuits, that substantially increases civil rights plaintiffs' pleading burden by requiring highly specific facts that negate a presumption of probable cause.

Each of these insidious problems significantly hamper the effective vindication of plaintiffs' civil rights in the Fifth Circuit, and cannot be allowed to stand uncorrected.

I. The Fifth Circuit has so far departed from the accepted and usual course of proceedings on the motion to dismiss standard that it calls for this Court's intervention.

A. The pleading standard is clear, well-known, and undisputed.

This Court, every court below it, and everyone that has taken a civil procedure class knows the pleading rules. A complaint that states a claim for relief must contain a short and plain statement of jurisdiction, a short and plain statement of the claim showing entitlement to relief, and the relief sought. Fed. R. Civ. P. 8(a). In response to a pleading, the defendant may move for the court to dismiss the complaint because it fails to state any possible claim upon which to grant relief. Fed. R. Civ. P. 12(b)(6).

When considering a motion to dismiss, every court knows, and is tasked to apply, this Court's long-understood standard of review. Simply put, a complaint must survive when it contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). Plausibility under this standard is unrelated to probability, but "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556). Specifically, "[f]actual allegations must be enough to raise a right to relief above the speculative level

. . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555. With that in mind, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* at 556 (internal citations and quotations omitted).

Of course, legal conclusions are "not entitled to the assumption of truth," *Iqbal*, 556 U.S. at 679, and complaints fail where their assertions are "devoid of further factual enhancement." *Id.* at 678 (cleaned up). So while "detailed factual allegations" are not required, *Id.*, courts are meant to balance access to the courts via plain, notice-based pleading against the need to weed out claims that are merely speculative.

Ostensibly, the Fifth Circuit views motions to dismiss "with disfavor," and believes they should be "rarely granted." *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009) (internal quotations and citations omitted). This is so because it acknowledges that it should view the facts in the light most favorable to the plaintiff, making reasonable inferences and resolving contested facts and factual ambiguities in the their favor. *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019) (citations omitted).

Because this is an inherently "context-specific task," *Iqbal*, 556 U.S. at 679, Petitioner will outline the legal context of pleading First and Fourth

Amendment claims under 42 U.S.C. § 1983 before demonstrating how far the Fifth Circuit has departed from this accepted standard.

B. Based on the pleading standard and the Court's and Circuits' clear First and Fourth Amendment precedent, the Fifth Circuit's ruling upends their accepted and usual application.

When considering § 1983 and *Monell* claims, this Court has made clear that such cases are not subject to any kind of heightened pleading standard, as long as the facts alleged make a plausible constitutional claim. *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam) (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 164 (1993) (a federal court may not apply a standard "more stringent than the usual pleading requirements of Rule 8(a)" in "civil rights cases alleging municipal liability")).

With respect to the First Amendment, this Court is "mindful that the preservation of liberty depends in part upon the maintenance of social order. But the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *Houston v. Hill*, 482 U.S. 451, 472 (1987) (internal citation omitted). To that end, it has recently made clear that for a First Amendment retaliation claim, a plaintiff must almost always plead the lack of probable

cause because it "generally provide[s] weighty evidence that the officer's animus caused the arrest." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (citing *Reichle v. Howards*, 566 U.S. 658, 668 (2012))[1]; *see also Lozman v. Riviera Beach*, 138 S. Ct. 1945 (2018) (allowing a retaliation claim against a municipality for its policy of retaliation); *Hartman v. Moore*, 547 U.S. 250, 259–60 (2006) (creating the no-probable-cause requirement for prosecutorial retaliation cases); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U. S. 274, 285 (1977) (requiring a showing that the alleged retaliation would not have happened absent retaliatory motive).

With respect to both First and Fourth Amendment claims in protest and other similar settings, the Circuits are clear and united in the fact that unjustified arrests—even mass arrests—are and

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[1] The *Bartlett* Court expressly chose not to create a strict requirement, noting that "[a]lthough probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so. In such cases, an unyielding requirement to show the absence of probable cause could pose a risk that some police officers may exploit the arrest power as a means of suppressing speech." 139 S. Ct. at 1727 (cleaned up) (quoting *Lozman*, 138 S. Ct. at 1953). Justice Gorsuch further explains that the First Amendment protects a distinctly different right than the Fourth Amendment, and notes that "if the only offense for which probable cause to arrest existed was a minor infraction of the sort that wouldn't normally trigger an arrest in the circumstances—or if the officer couldn't identify a crime for which probable cause existed until well after the arrest—then causation might be a question for the jury." *Id.* at 1732.

should be actionable where there is reason to believe the arrest was pretextual or probable cause was otherwise plausibly absent. *See, e.g., Baude v. Leyshock*, 23 F.4th 1065 (8th Cir. 2022); *Keating v. City of Miami*, 598 F.3d 753 (11th Cir. 2010); *McTernan v. City of York*, 564 F.3d 636 (3d Cir. 2009); *Beck v. City of Upland*, 527 F.3d 853 (9th Cir. 2008); *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 14 F.3d 457 (9th Cir. 1994).

Here, the allegations clearly meet the pleading standard in light of the First and Fourth Amendment context. Mr. Utley clearly pled that he and the other protestors he was with that night were pretextually arrested for obstructing a roadway. He pled directly that the protestors were not obstructing the roadway when the police conducted their kettle maneuver, and that no other basis existed for the mass arrest. He further pled that he and the other protestors were instructed to "disperse," and that he attempted to comply but was prevented from doing so by the kettle maneuver itself. Beyond his own arrest, he alleged that hundreds of protestors across different protests at different places and times were also kettled and arrested by HPD, and that nearly all of them were arrested for obstructing a roadway, but that the charges were later dropped.

Despite these pleadings, the Fifth Circuit found, with little explanation, that Mr. Utley "was obstructing a roadway in violation of Tex. Penal Code § 42.03." 2a–3a. It labeled, again without explanation, Mr. Utley's pleadings as conclusory. 3a.

But the allegations about the lack of probable cause are not "conclusory"; in reality, he alleges the *fact* that he and the other protestors "had not obstructed any roadway," which supports the conclusion that "there was no reasonable suspicion that [the protestors] had committed a crime," chiefly the crime of obstructing a roadway. Just because the fact pled is stated using the language of the statute Mr. Utley was alleged to have violated does not transform a factual allegation into a conclusory one. Whether or not Mr. utley and the other protestors were physically obstructing a roadway or sidewalk is the fact at issue, whereas the presence or absence of probable cause is the legal determination that needed to be made. Because the *fact* alleged only leads to one legal conclusion, to find otherwise contravenes the accepted pleading standard.

Put differently, there is no "further factual enhancement" that could have been alleged to support the lack of probable cause. This is so because while Mr. Utley could have alternatively or additionally pled that the protestors were not inhibiting traffic or blocking access to the sidewalk, those pleadings are merely a reformulation of the pleading that no roadway was obstructed.

The only possible support for a finding of probable cause is that there were "many other protestors" and that they were all arrested, but those two facts combined simply do not support the inference that probable cause existed. The mere existence of a group of protestors implies no more

obstruction than what a bustling metropolis like Houston experiences regularly in the form of standard foot and vehicle traffic, and participation in such a protest is no more an offense than walking down a busy street among other pedestrians. Moreover, the mass arrest is the exact unconstitutional action at issue here, so the mere fact that it occurred cannot itself support the legality of the action. There are no more facts that Appellant could have pled (nor do *Twobly* or *Iqbal* require more facts) that would support the absence of probable cause beyond what was already included in the complaint.

In the context of First and Fourth Amendment protest cases, there is no precedent for believing that a mass arrest was supported by probable cause merely because the entire group was arrested for the same pretextual crime. Moreover, there is no basis in the First Amendment specifically to allow for a series of hyper-technical mass arrests on small misdemeanors to justify the suppression of peaceful protests. As a result, the Fifth Circuit clearly and egregiously upended the accepted and usual application of the pleading standard, and must be corrected.

II. The Fifth Circuit's ruling creates a new, unique requirement for plaintiffs to prove a negative in order to state a First or Fourth Amendment claim.

Perhaps more insidiously than the upending of the pleading standard, the Panel's opinion

assumes that wrongdoing occurred unless Mr. Utley had been able to completely and affirmatively *negate* the existence of probable cause beyond what was already in the pleadings. If a court can make inferences against the plaintiff to find probable cause, plaintiffs are forced into the Sisyphean task of proving a negative, but without the benefit discovery. According to Petitioner's research, no precedent of this Court or any Circuit requires plaintiffs to affirmatively prove a negative in light of default assumptions made against them. Such a requirement places a significant bar to any effective remedy under the First and Fourth Amendments, and gives police departments and officers *carte blanche* to affect unjustifiable arrests, so long as any possible pretext *might* exist to make it.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted,

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